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# State v. Schultz Appellant's Brief Dckt. 32111

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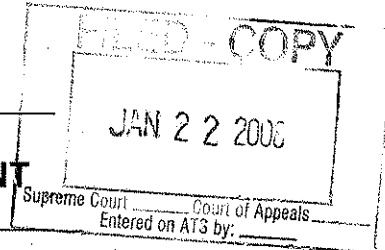
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
Plaintiff-Respondent, )  
 )  
v. )  
 )  
DAWN LENORE SCHULTZ, )  
 )  
Defendant-Appellant. )

NO. 32111

APPELLANT'S BRIEF

BRIEF OF APPELLANT



APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

HONORABLE CHERI C. COPSEY  
District Judge

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

SARA B. THOMAS  
Chief, Appellate Unit  
I.S.B. # 5867

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ATTORNEY FOR  
PLAINTIFF-RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

Dawn Lenore Schultz appeals from the district court's Judgment of Conviction and Restitution Order upon being found guilty of grand theft by unauthorized control, grand theft, and four counts of forgery. The district court ordered that Ms. Schultz pay restitution in the amount of \$21,985.28. On appeal, Ms. Schultz asserts that, at most, she is liable for \$18,345.00 of the restitution ordered as only that amount is derived from the offenses upon which she was found guilty by a jury and were resulting from her criminal offenses.

### Statement of the Facts and Course of Proceedings

In July of 2004, Ms. Schultz was charged by State's Information with grand theft by unauthorized control, grand theft, and four counts of felony forgery. (R., pp.17-20.) Count I in the State's Information alleged that Ms. Schultz committed the offense of grand theft by unauthorized control by "knowingly exercise[ing] unauthorized control and/or made unauthorized transfer of an interest over credit card accounts and/or bank accounts, the property of Audrey Shayne, with the intent to deprive the owner thereof and/or did the above taking in a value in excessive of One Thousand Dollars. . . ." (R., p.22.) Count II alleged that Ms. Schultz committed grand theft by taking a tennis bracelet, belonging to Audrey Shayne, which had a value in excess of \$1,000. (R., p.22.) Counts III through VI alleged that Ms. Schultz committed felony forgery for passing eight checks, on the account of Audrey Shayne, payable to herself, in an amount totaling \$2,721.45. (R., pp.22-23.)

Ms. Schultz' relationship with Ms. Shayne began in 2002 when Ms. Shayne met Ms. Schultz through a mutual friend. (Tr., p.46, Ls.20-23; p.193, Ls.13-23.) When Ms. Shayne met Ms. Schultz, Ms. Schultz was working in management at Kaybee Toys in the Boise Mall. (Tr., p.595, Ls.1-20.) In October of 2003, Ms. Schultz quit her management position at Kaybee Toys and began working for Ms. Shayne as her personal assistant. (Tr., p.47, L.6 – p.48, L.6.) As compensation, Ms. Shayne agreed to let Ms. Schultz live in her 13<sup>th</sup> Street house in Boise, rent and utility free, agreed to pay for medical treatment necessary for Ms. Schultz' teeth, and would provide her with cash as needed for cigarettes, food, and gas. (Tr., p.48, L.7 – p.49, L.21.) As part of her position Ms. Schultz was required to pay Ms. Shayne's bills and run various errands for her as needed. (Tr., p.48, Ls.2-4, p.49, L.25 – p.51, L.5.) As her personal assistant, Ms. Schultz made numerous online purchases for Ms. Shayne using Ms. Shayne's credit card. (Tr., p.206, L.2 – p.207, L.21.)

At trial, the State offered evidence that Ms. Schultz authored and passed check number 2045 in the amount of \$272.05, check number 2062 in the amount of \$190.00, check number 2076 in the amount of \$150.00, check number 2150 in the amount of \$200.00, check number 2154 in the amount of \$500.00, check number 2202 in the amount of \$400.00, check number 2155 in the amount of \$500.00, and check number 2157 in the amount of \$509.40, all payable to Ms. Schultz on the account of Ms. Shayne without her permission. (Tr., p.143, L.7 – p.160 (Ms. Shayne's testimony that she did not sign or authorize the listed checks), L.3, p.625, L.20 – p.638, L.19 (Ms. Schultz' testimony that she authored the listed checks).) On Count II, the State offered evidence that Ms. Schultz' pawned Ms. Shayne's diamond and opal tennis bracelet in October of

2003 for \$250. (Tr., p.70, L.14 – p.73, L.2 (Ms. Shayne testifying that she did not give Ms. Schultz the bracelet), p.449, L.3 – p.454 L.17 (Employee at Vista Pawn testifying that Ms. Schultz pawned the bracelet for \$250).)

Finally, with regard to Count I, grand theft by unauthorized control, the State offered the following evidence: while on her trip to Mexico to get her teeth fixed, Ms. Schultz made a number of unauthorized withdraws and purchases using Ms. Shayne's U.S. Bank card (Tr., p.102, L.15 – p.109, L.15); Ms. Schultz either assisted in the creation of, or had knowledge that her friend Keith Lynch, created a new credit account<sup>1</sup> under both his and Ms. Shayne's name using her credit information, without her knowledge (Tr., p.121, L.16 – p.130, L.23); Ms. Shultz either assisted or had knowledge that two payments on the MBNA Platinum Plus credit card using Ms. Shayne's U.S. Bank account, without Ms. Shayne's authorization (Tr., p.137, L.1 – p.138, L.12); Ms. Schultz used Ms. Shayne's U.S. Bank account to charge two separate stays at the Anniversary Inn, without her authorization (Tr., p.569, L.2 – p.571, L.17); and, two purchases were made using Ms. Shayne's Merrill Lynch account, one for a Dell computer, and one for Blink 182 concert tickets, while Ms. Schultz had access to the account and without Ms. Shayne's authorization (Tr., p.559, L.20 – p.568, L.5.)

After listening to five days of testimony, the jury convicted Ms. Schultz on all charges. (R., pp.132-137.) The district court imposed a unified sentence of fourteen years, with two years fixed, on each offense, to be served concurrently. (R., pp.148-150.) Ms. Schultz then filed a timely Notice of Appeal from the Judgment of Conviction. (R., pp.152-154.) Ms. Schultz filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for a reduction in sentence, which was denied by the district court. (R., pp.171-

181.) Following a restitution hearing, the district court imposed restitution in the amount of 21,985.28. (R., pp.188-193 (Restitution Order), 197-202 (Corrected Restitution Order).)

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<sup>1</sup> The credit account was from MBNA Platinum Plus.



ISSUE

Did the district court err by imposing restitution in the amount of \$21,985.28?

## ARGUMENT

### I.

#### The District Court Erred By Imposing Restitution In The Amount Of \$21,985.28

##### A. Introduction

Ms. Schultz contends that only \$18,345.00 of the restitution order was derived from her criminal convictions at trial. Therefore, because Ms. Schultz did not consent to pay restitution beyond that stemming from her criminal convictions, the district court erred in imposing restitution in excess of that amount.

##### B. The District Court Erred By Imposing Restitution In The Amount Of \$21,985.28

Following the trial and pronouncement of sentence, the State filed a Motion for Order of Restitution and then an Amended Motion for Order of Restitution<sup>2</sup> seeking restitution in the amount of \$25,138.35.<sup>3</sup> (R., pp.164-165, 185-187.) After holding a hearing on the State's motions seeking restitution, the district court imposed restitution in the amount of \$21,985.28.<sup>4</sup> (R., pp.188-193, 197-202.) Ms. Schultz asserts that the district court erred in imposing restitution beyond \$18,345.00, which is the amount derived from her criminal convictions.

The decision whether to require restitution is within the trial court's sound discretion. *State v. Hamilton*, 129 Idaho 938, 942, 935 P.2d 201, 205 (Ct. App. 1997).

---

<sup>2</sup> In the State's Amended Motion for Order of Restitution, the State asserts that its motion is based on the "attached documents" as well as the evidence offered during the trial and contained in the Presentence Investigation Report. On January 22, 2008, appellate counsel contacted Brad Thies, the district court clerk, and was informed that the district court file did not include any "attached documents" to the State's amended motion.

<sup>3</sup> The State's Amended Motion for Order of Restitution is attached to this brief as Appendix A, for ease of reference.

<sup>4</sup> The district court's Corrected Restitution Order is attached to this Brief as Appendix B, for ease of reference.

The determination of the amount of restitution is a question of fact for the district court. *State v. Bybee*, 115 Idaho 541, 544, 768 P.2d 804, 807 (Ct. App. 1989). The exercise of discretion must encompass consideration of the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and other factors deemed appropriate by the court. *Id.* Idaho Code (I.C.) § 19-5304(7). Findings on the amount of restitution, if supported by substantial evidence, will not be disturbed on appeal. *Bybee* at 544, 768 P.2d 804.

Idaho Code § 19-5304 guides restitution that can be ordered in a criminal case. Under I.C. § 19-5304(1)(a):

“[e]conomic loss” includes, but is not limited to, the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses **resulting from the criminal conduct**, but does not include less tangible damage such as pain and suffering, wrongful death or emotional distress.

*Id.* (emphasis added). Idaho Code § 19-5304(1)(e) defines a victim as “The directly injured victim which means a person or entity who suffers economic loss or injury **as a result of the defendant’s criminal conduct....**” *Id.* (emphasis added). Idaho Code § 19-5304(2) cautions that “a defendant shall not be required to make restitution in an amount beyond that authorized by this chapter.” *Id.* Further, “[t]he court may, with the consent of the parties, order restitution to victims, and/or any other person or entity, for economic loss or injury for crimes which are not adjudicated or are not before the court.” I.C. § 19-5304(9).

“Where the language of a statute is plain and unambiguous, th[e] court must give effect to the statute as written, without engaging in statutory construction.” *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (2001). Idaho Code § 19-5304 is plain

and unambiguous in that a defendant only owes restitution for economic loss or injury resulting from his adjudicated criminal conduct, unless he consents to owing additional restitution to other persons for crimes which have not been adjudicated. Here, the amount of restitution resulting from Ms. Schultz adjudicated criminal conduct was \$18,345.00.<sup>5</sup>

1. The District Court Erred In Ordering Restitution In The Amount Of \$9,493.36 For Alleged Thefts From Ms. Shayne's U.S. Bank Account

The district court ordered restitution in the amount of \$9,493.36 for alleged thefts from Ms. Shayne's U.S. Bank account. (R., pp.200-201.) Ms. Schultz concedes that the payments from Ms. Shayne's U.S. Bank account to the MNBA account in the amount of \$1,900 were properly ordered by the district court. (See Tr., p.137, L.1 – p.138, L.12; R., p.200.) Ms. Schultz also concedes that she is liable for \$673 of overdraft charges on Ms. Shayne's bank account. (See R., p.200.) Finally, Ms. Schultz concedes that charges made on Ms. Shayne's U.S. Bank account for the unauthorized stays at the Anniversary Inn, in the amount of 601.50, were properly imposed restitution. (R., pp.200-201.) However, Ms. Schultz asserts that the district court incorrectly determined that she owed \$2,834.16 for restitution from the forged checks. (R., p.200.) Further, all other requested and ordered restitution on Ms. Shayne's U.S. Bank account was not derived from Ms. Schultz' criminal conduct and was not supported by any admissible evidence.

---

<sup>5</sup> Ms. Schultz concedes that the district court correctly determined that she was responsible for \$737.74 in restitution for charges made on Ms. Shayne's Merrill Lynch Visa Card and the district court correctly determined that she was responsible for restitution in the amount of \$9,609.91 for charges made on the MNBA card. (See R., p.201.)

a. The District Court Erred In Ordering That Ms. Schultz Pay \$2,834.16 For Checks Forged On Ms. Shayne's U.S. Bank Account

Ms. Schultz was charged with four counts of forgery for authoring and passing eight checks on Ms. Shayne's U.S. Bank account. The check numbers and amounts of each check are as follows: check #2045 for \$272.05, check #2062 for \$190.00, check #2076 for \$150.00, check #2150 for \$200.00, check #2154 for \$500.00, check #2202 for \$400.00, check #2155 for \$500.00, and check #2157 for \$509.40. (Tr., p.143, L.7 – p.160, L.3, p.625, L.20 – p.638, L.19; R., pp.21-23.) The district court concluded that the amount Ms. Schultz owed for checks forged on Ms. Shayne's account was \$2,834.16. However, the total of all eight forged checks is \$2,721.45. Accordingly, the district court erred in imposing restitution beyond \$2,721.45 for checks forged on Ms. Shayne's U.S. Bank account.

b. The District Court Erred In Ordering All Other Restitution For Charges Made On Ms. Shayne's U.S. Bank Account

The district court found that Ms. Schultz was required to pay additional restitution derived from uncharged conduct as follows:

1.	Two Boys Towing	\$72.00
2.	Econolube	\$403.34
3.	Smart Style	\$21.67
4.	Strong Idea	\$217.90
5.	UPS Store	\$30.41
6.	Sears.com	\$228.38

(R., pp.200-201.)

However, Ms. Schultz was never charged with making the referenced transactions, nor did the State offer any evidence at trial that Ms. Schultz made the transactions or even if she did, that they were not authorized by Ms. Shayne. (See

R., pp.20-23; Trial Transcript.) Thus, the jury could not have convicted her on any of the charged offenses for any of the above referenced transactions, and therefore, even if those charges are the result of criminal conduct, it is unadjudicated criminal conduct which is expressly prohibited by I.C. § 19-5304.

2. The District Court Erred In Ordering Restitution For Charges Made On Ms. Shayne's Bon Marche Visa Card<sup>6</sup>

The district court found that Ms. Schultz was responsible for restitution in the amount of \$1,237.64 for charges made on Ms. Shayne's Bon Marche Visa card. (R., p.201.) However, the only testimony referencing Ms. Shayne's Bon Marche card is testimony during the trial that the card was found in Ms. Schultz' purse at the 13<sup>th</sup> Street residence, which of course is not unusual considering Ms. Schultz often ran errands for Ms. Shayne and made purchases on her behalf. (Tr., p.115, L.10 – p.117, L.1, p.119, Ls.1-9 (Ms. Shayne testifying that she was "not sure" if she gave Ms. Schultz her Bon card to make purchases on her behalf).) While the State offered testimony that Ms. Shayne's Bon Marche Visa card was found in Ms. Schultz' possession, the State failed to offer any evidence at trial that any improper charges were made on the Bon card. As such, the jury could not have found that Ms. Schultz was criminally liable for charges made on the card if no evidence was ever offered of criminal conduct. Accordingly, to the extent any criminal conduct resulted from charges made on Ms. Shayne's Bon card, it was not adjudicated and Ms. Schultz cannot be required to pay restitution for unadjudicated criminal conduct absent consent. Thus, the district

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<sup>6</sup> Since the events in the instant case, the Bon Marche changed its name to Bon Macy's, then just to Macy's.

court erred in imposing restitution in the amount of \$1,237.64 for charges made on Ms. Shayne's Bon Marche card.

3. The District Court Erred In Ordering That Ms. Schultz Pay Restitution In The Amount of \$906.63 For Charges And Late Fees Relating To Ms. Shayne's Citibank Mastercard

Defense counsel below conceded that \$108.27 purchase from Figis was supported by the evidence. (R., p.201.) As a result, Ms. Schultz does not challenge that amount on appeal as it was conceded below. Moreover, because finance charges accruing on the Citibank Mastercard could be seen as resulting from Ms. Schultz' conceded criminal conduct, Ms. Schultz does not challenge those amounts on appeal either. However, Ms. Schultz does contend that the district court erred in concluding that she was responsible for the purchase of lingerie from Victoria's Secret in the amount of \$226.23.<sup>7</sup> Contrary to the district court findings, there was no testimony during the trial of any unauthorized purchase from Victoria's Secret. (See Trial Transcript) Accordingly, because the jury could not have rendered a verdict on the alleged unauthorized transactions with Victoria's Secret, it was not adjudicated and Ms. Schultz cannot be required to pay restitution for unadjudicated criminal conduct absent consent. Moreover, the State failed to offer any admissible evidence that these purchases from Victoria Secret were made by Ms. Schultz, or not authorized by Ms. Shayne.

---

<sup>7</sup> The district court found that Ms. Shayne testified during the trial that she did not purchase lingerie at Victoria Secret and the items were not even in her size. (R., p.201.) After reading the trial transcript several times, appellate counsel was unable to find any reference to Victoria Secret, much less testimony from Ms. Shayne that she did not purchase lingerie at Victoria Secret. However, if in fact that testimony does exist, and there is evidence of unauthorized purchases at Victoria Secret made by Ms. Schultz, appellate counsel withdraws Ms. Schultz' challenge to this amount.

CONCLUSION

Ms. Schultz respectfully requests that this Court vacate the district court's order of restitution and enter an order of restitution in the amount of \$18,345.00.

DATED this 22<sup>nd</sup> day of January, 2008.

  
\_\_\_\_\_  
ERIC D. FREDERICKSEN  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

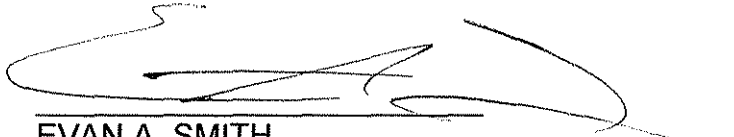
I HEREBY CERTIFY that on this 22<sup>nd</sup> day of January, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DAWN LENORE SCHULTZ  
1220 BELMONT ST  
BOISE ID 83706

CHERI C COPSEY  
DISTRICT COURT JUDGE  
ADA COUNTY DISTRICT COURT  
200 WEST FRONT STREET  
BOISE ID 83702

ADA COUNTY PUBLIC DEFENDERS  
200 WEST FRONT STREET  
BOISE ID 83702

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
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PO BOX 83720  
BOISE ID 83720-0010  
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH  
Legal Secretary

EDF/eas

# APPENDIX A

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 9:25 P.M. \_\_\_\_\_

NOV 15 2005

By J. David Navarrete  
DEPUTY

**GREG H. BOWER**

Ada County Prosecuting Attorney

**Fafa Alidjani**

Deputy Prosecuting Attorney

200 W. Front Street, Room 3191

Boise, Id. 83702

Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, )

Plaintiff, )

vs. )

DAWN L. SCHULTZ, )

Defendant, )

**Case No. H0401069**

**AMENDED MOTION FOR  
AN ORDER OF  
RESTITUTION**

COMES NOW, The Ada County Prosecuting Attorney, by and through Fafa Alidjani, Deputy Prosecuting Attorney for Ada County, State of Idaho, pursuant to Idaho Code § 19-5304, hereby moves this Court for an order to grant restitution in the amount of \$25,138.35 for the direct out of pocket cost to Audrey Shayne, MBNA America, and Vista Pawn, to be paid through the Ada County Prosecutor's office in the above entitled matter.

Audrey Shayne

US Bank Account - \$9,493.36

Merrill Lynch Account - \$2,825.04

Bon-Macy's Credit Card - \$1,237.64

Citibank MasterCard - \$1,722.40

MBNA Platinum Mastercard - \$9,609.91

Vista Pawn - \$250.00

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Total: \$25,138.35

This Motion is based upon the above cited law, the attached document summaries, and all other matters of record that are part of the Pre Sentence Investigation Report and evidence admitted at trial.

DATED this 15<sup>th</sup> day of November, 2005.

**GREG H. BOWER**

Ada County Prosecuting Attorney

B. Ouzer for  
By: Fafa Alidjani  
Deputy Prosecuting Attorney

## APPENDIX B

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 400

DEC 12 2005

By DAVID NAVARRO Clerk  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

DAWN LENORE SCHULTZ

Defendant.

CASE NO. H0401069

**CORRECTED RESTITUTION ORDER**

It having come to the Court's attention that the Restitution Order entered on the 8<sup>th</sup> day of December 2005 contained an error, the Court hereby issues a Corrected Restitution Order and makes it effective nunc pro tunc December 8, 2005.

April 22, 2005, a jury found Dawn Schultz guilty of one count of Grand Theft By Unauthorized Control, Felony, I.C. 18-2403(3), 18-2407(1)(B), one count of Grand Theft, Felony, I.C. 18-2403(1), 18-2407(1)(B) and four counts of Forgery, Felony, I.C. 18-3601 committed between October 2003 and April 2004. The Court entered judgment on June 27, 2005, and imposed sentence of two (2) year(s) fixed and twelve (12) year(s) indeterminate for an aggregate term of fourteen (14) year(s) on each count with all counts to run concurrently. The Court gave Schultz credit for time served of seventy (70) days. The amount of restitution was left open until the restitution hearing.

Pursuant to I.C. § 19-5304, the Court held a restitution hearing September 12, 2005. The State requested restitution in the total amount of \$25,138.35. Schultz objected and filed a memorandum in support. The State asked the Court to consider the evidence produced at trial, as well as the evidence in the presentence report. Schultz did not object.

At the end of the hearing the Court ordered the State to break its requests down, identifying the basis for its totals, and provide more support. November 15, 2005, the State filed

**CORRECTED RESTITUTION ORDER**  
CASE NO. H0401069

1 additional detailed documents supporting its requested restitution. The State specifically  
2 requested restitution broken down as follows:

3 **U.S Bank Check Card (acct xxxxxxxx7371) \$9,493.36**

Category	Amount
4 Forged checks	\$2,834.16
5 Overdraft returned check fees	\$ 673.00
6 MBNA Internet payment	\$1,900.00
7 Mexico trip theft	\$2,497.00
8 Two Boys Towing	\$ 72.00
9 Anniversary Inn	\$ 601.50
Smartstyle	\$ 21.67
10 Econolube	\$ 403.34
UPS Store	\$ 30.41
11 StongIdea	\$ 217.90
Sears.com	\$ 228.38

12 **Merrill Lynch Visa Card (acct xxxxxxxx5164) \$2,825.04**

13 **Bon Macy credit card (acct xxxxxxxx5427) \$1,237.64**

14 **CITI Master Card (acct xxxxxxxx1011) \$1,722.40**

15 **MBNA Platinum MasterCard (acct xxxxxx9680/xxx3258)**

16 Total charged on account less 2 payments from victim's US bank acct.

17 Outstanding Balance \$9,609.91

18 **Vista Pawn \$ 250.00**

19 The State supported each category with evidence and statements from the victim.

20 December 6, 2005, Schultz replied and continued to object to most of the requested  
21 amounts. She conceded through counsel the evidence supported restitution in the amount of  
22 \$2,109.40 for forged checks, overdraft fees of \$186.00, and \$2,497.00 for the Mexico trip for a  
23 total of \$4,792.40 for the U.S. Bank check card claims. Schultz objected to the remaining  
24 amounts claimed in the U.S. Bank category. Schultz also conceded through counsel that the  
25 evidence supported restitution in the amount of \$737.74 on the Merrill Lynch Visa Card and  
26 contested the remaining amounts. She also conceded the evidence supported restitution in the  
27 amount of \$250.00 for Vista Pawn. However, she contends that the evidence does not support the  
28 rest of the amounts and argues that Keith Lynch, her friend, was responsible for all the amounts  
29 on MBNA Platinum MasterCard opened by Schultz. Therefore, she concedes the evidence  
30 supports a restitution award of \$5,888.41.

1 The Court, having reviewed all the evidence, including the evidence produced at trial and  
2 in the presentence report, finds that restitution in the amount of \$21,985.28 is supported by the  
3 evidence and that the State has proven the amount by a preponderance of the evidence. Therefore,  
4 in an exercise of discretion, guided by consideration of the factors set forth in I.C. §19-5304 and  
5 by the policy favoring full compensation to crime victims who suffer economic loss, the Court  
6 orders restitution in the amount of \$21,985.28.

### 7 ANALYSIS

8 A decision to order restitution is within the discretion of a trial court, guided by  
9 consideration of the factors set forth in I.C. §19-5304 and by the policy favoring full  
10 compensation to crime victims who suffer economic loss. *State v. Richmond*, 137 Idaho 35, 43  
11 P.3d 794, 796 (Ct.App. 2002). The amount of the restitution should be proven by a  
12 preponderance of the evidence. *Id.* The burden is on the party requesting restitution to establish  
13 the basis for that restitution by a preponderance of the evidence. *Id.*

14 I.C. § 19-5304 provides, in relevant part, as follows:

15 (1) As used in this chapter:

16 (a) "Economic loss" includes, but is not limited to, the value of  
17 property taken, destroyed, broken, or otherwise harmed . . . , and direct out-of-  
18 pocket losses or expenses, . . . , but does not include less tangible damage such as  
19 pain and suffering, wrongful death or emotional distress.

20 \*\*\*\*\*

21 (2) Unless the court determines that an order of restitution would be  
22 inappropriate or undesirable, it shall order a defendant found guilty of any crime  
23 which results in an economic loss to the victim to make restitution to the victim.  
24 An order of restitution shall be a separate written order in addition to any other  
25 sentence the court may impose, including incarceration, and may be complete,  
26 partial, or nominal. The court may also include restitution as a term and condition  
27 of judgment of conviction; however, if a court orders restitution in the judgment of  
28 conviction and in a separate written order, a defendant shall not be required to  
29 make restitution in an amount beyond that authorized by this chapter. Restitution  
30 shall be ordered for any economic loss which the victim actually suffers. The  
31 existence of a policy of insurance covering the victim's loss shall not absolve the  
defendant of the obligation to pay restitution.

(4) If a separate written order of restitution is issued, an order of restitution  
shall be for an amount certain and shall be due and owing at the time of sentencing



1 or at the date the amount of restitution is determined, whichever is later. An order  
2 of restitution may provide for interest from the date of the economic loss or injury.

3 \*\*\*\*\*

4 (6) Restitution orders shall be entered by the court at the time of  
5 sentencing or such later date as deemed necessary by the court. Economic loss  
6 shall be based upon the preponderance of evidence submitted to the court by the  
7 prosecutor, defendant, victim or presentence investigator. Each party shall have  
8 the right to present such evidence as may be relevant to the issue of restitution, and  
9 the court may consider such hearsay as may be contained in the presentence report,  
10 victim impact statement or otherwise provided to the court.

11 (7) The court, in determining whether to order restitution and the amount  
12 of such restitution, shall consider the amount of economic loss sustained by the  
13 victim as a result of the offense, the financial resources, needs and earning ability  
14 of the defendant, and such other factors as the court deems appropriate. The  
15 immediate inability to pay restitution by a defendant shall not be, in and of itself, a  
16 reason to not order restitution.

17 **1. U.S. Bank category.**

18 Schultz contends the overdraft amount should only be \$186.00. However, the Court finds  
19 that overdrafts occurred as follows: 6 overdraft charges from April 15-16, 2004 at \$31.00 each  
20 and 14 overdraft charges from February 26-March 1, 2004, at \$29.00 each and 3 returned check  
21 charges during the same time period at \$27.00 each for a total of \$673.00. Therefore, the Court  
22 finds the State has proven the amount by a preponderance of the evidence.

23 While Schultz contends that the evidence only supports forged checks in the amount of  
24 \$2,109.40, the Court disagrees and finds that the preponderance of the evidence produced both at  
25 trial and in the presentence report supports restitution for \$2,834.16 for forged checks.

26 The Court further finds that the preponderance of the evidence is that the victim, Audrey  
27 Shayne, did not authorize Schultz to pay \$72.00 to Two Boys Towing or \$403.34 to Econolube.  
28 Likewise, while Schultz claims that her boyfriend, Keith Lynch, was responsible for the electronic  
29 payments totaling \$1,900.00 to the MBNA account set up by Schultz, there is no evidence to  
30 support her contention. There is no evidence that Keith Lynch ever had access to or used the  
31 victim's U.S. Bank account. The Court finds a preponderance of the evidence supports restitution  
of \$1,900.00.

While Schultz contends she stayed at the Anniversary Inn with the victim's permission,  
there is no evidence to support that contention. The victim specifically testified she did not give

1 her permission and the confirmation went directly to Schultz at her email address and was for  
2 "Dawn and Keith." The Court finds a preponderance of the evidence supports restitution of  
3 \$601.50 for the stay at the Anniversary Inn.

4 Schultz also contends the expenditure of \$21.67 to Smart Style and \$217.90 to Strong Idea  
5 were either for the victim or had the victim's permission. However, the Court finds a  
6 preponderance of the evidence supports restitution of both.

7 The Court also finds a preponderance of the evidence supports restitution of the UPS Store  
8 charge of \$30.41 and charges at Sears.com of \$228.38. Therefore, the Court finds a  
9 preponderance of the evidence supports restitution for **\$9,493.36** for the U.S. Bank account thefts.

10 **2. Merrill Lynch Visa Card.**

11 Schultz concedes the evidence supports restitution for the purchase of the Dell Computer  
12 and the concert tickets for a total amount of \$737.74; she contests the rest of the amounts claimed.  
13 The Court finds insufficient evidence to support the rest of the claimed losses. The State has not  
14 sustained its burden to show the remaining amounts were stolen by Schultz. Therefore, the Court  
15 finds a preponderance of the evidence supports restitution for **\$737.74** for the Merrill Lynch Visa  
16 Card thefts.

17 **3. Bon Macy's Card.**

18 When Schultz was arrested she had the victim's Bon Marche<sup>1</sup> Visa card and her Bon  
19 Rewards card. She also had receipts from the Bon Macy's verifying many of her purchases. The  
20 victim credibly testified that Schultz made purchases on the card totaling **\$1,237.64**, and the Court  
21 finds this amount established by a preponderance of the evidence.

22 **4. CitiBank Mastercard Card.**

23 The CitiBank Mastercard was found in Schultz's possession when she was arrested. The  
24 victim credibly testified she did not purchase lingerie at Victoria Secret in the amount of \$226.23<sup>2</sup>  
25 and the evidence from Schultz's computer also supports the purchase from Figis in the amount of  
26 \$108.27.<sup>3</sup> There was also evidence that the victim incurred late fees and finance charges in the  
27

28  
29 <sup>1</sup> Bon Marche became Bon Macy's.

30 <sup>2</sup> The victim testified the items were not even her size.

<sup>3</sup> Schultz agrees this amount was supported by the evidence.

1 amount of \$64.90 (1-13-04), \$118.55 (2-11-04), \$104.79 (3-11-04), \$159.61 (4-12-04), and  
2 \$124.28 (5-12-04) for a total of \$572.13.

3 The Court finds the amount of \$906.63 was established by a preponderance of the  
4 evidence.

5 **5. MBNA Platinum Mastercard.**

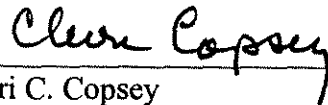
6 While Schultz attempts to place the responsibility for these charges on Keith Lynch, the  
7 evidence clearly supports the State's position that Schultz set up the account using the victim's  
8 personal information and used the cards. The State also established by a preponderance of the  
9 evidence that it was Schultz who gave the card to Lynch and authorized his use of the card.  
10 Furthermore, Schultz received a number of e-mail's from MBNA regarding the account.  
11 Therefore, the Court finds the preponderance of the evidence supports the State's request for  
12 restitution from Schultz in the amount of \$9,609.91.

13 As part of its analysis, the Court considered the amount of economic loss sustained by the  
14 victim as a result of the offense and balanced that against Schultz's financial resources, needs and  
15 earning ability. Schultz is able-bodied and has marketable skills. The Court considered the fact  
16 Schultz is presently incarcerated; however, the immediate inability to pay restitution by a  
17 defendant "shall not be, in and of itself, a reason to not order restitution."

18 After carefully reviewing all the evidence and the testimony, the Court orders the  
19 Defendant, Dawn Schultz, to make restitution in the total amount of \$21,985.28.

20 **IT IS SO ORDERED.**

21 Dated this 12<sup>th</sup> day of December 2005, effective nunc pro tunc December 8, 2005.

22  
23 

24 Cheri C. Copsey  
25 District Judge  
26  
27  
28  
29  
30